DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2510

RIN 1210–AA48

Proposed Regulation for Plans Established or Maintained Pursuant to Collective Bargaining Agreements Under Section 3(40) (A)

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains a proposed regulation under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001–1461 (ERISA or the Act), setting forth specific criteria that must be met in order for the Secretary of Labor (the Secretary) to find that an agreement is a collective bargaining agreement for purposes of this section. The proposed regulation also sets forth criteria for determining when an employee benefit plan is established or maintained under or pursuant to such an agreement. Employee benefit plans that meet the requirements of the proposed regulation are excluded from the definition of ''multiple employer welfare arrangements'' under section 3(40) of ERISA and consequently are not subject to state regulation of multiple employer welfare arrangements as provided for by the Act. If adopted, the proposed regulation would affect employee welfare benefit plans, their sponsors, participants, and beneficiaries as well as service providers to plans.

DATES: Written comments concerning this proposed rule must be received by October 2, 1995.

ADDRESSES: Interested persons are invited to submit written comments (preferably three copies) concerning the proposals herein to: Pension and Welfare Benefits Administration, Room N–5669, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, DC 20210. Attention: Proposed Regulation Under Section 3(40). All submissions will be open to public inspection at the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Ave., N.W., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Mark Connor, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Rm N–5669, 200 Constitution Ave., N.W., Washington, DC 20210 (telephone (202) 219–8671) or Cynthia Caldwell Weglicki, Office of the Solicitor, Plan Benefits Security Division, U.S. Department of Labor, Rm N–4611, 200 Constitution Ave., N.W., Washington, DC 20210 (telephone (202) 219–4592). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

A. Background

Notice is hereby given of a proposed regulation under section 3(40) of ERISA, 29 U.S.C. 1002(40). Section 3(40)(A) defines the term multiple employer welfare arrangement (MEWA) in pertinent part as follows:

> The term ''multiple employer welfare arrangement'' means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) [of section 3 of the Act] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained—
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> (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements * * *.

This provision was added to ERISA by the Multiple Employer Welfare Arrangement Act of 1983, Sec. 302(b), Pub. L. 97–473, 96 Stat. 2611, 2612 (29 U.S.C. 1002(40)), which also amended section 514(b) of ERISA. Section 514(a) of the Act provides that state laws which relate to employee benefit plans are generally preempted by ERISA. Section 514(b) sets forth exceptions to the general rule of section 514(a) and subjects employee benefit plans that are MEWAs to various levels of state regulation depending on whether or not the MEWA is fully insured. Sec. 302(b), Pub. L. 97–473, 96 Stat. 2611, 2613 (29 U.S.C. 1144(b)(6)).[1]

The Multiple Employer Welfare Arrangement Act legislation was introduced to counter what the Congressional drafters termed abuse by the ''operators of bogus 'insurance' trusts.'' 128 Cong. Rec. E2407 (1982) (Statement of Congressman Erlenborn). In his comments, Congressman Erlenborn noted that certain MEWA operators had been successful in thwarting timely investigations and enforcement activities of state agencies by asserting that such entities were ERISA plans exempt from state regulation by the terms of section 514 of ERISA. The goal of the bill, according to Congressman Erlenborn, was to remove ''any potential obstacle that might exist under current law which could hinder the ability of the States to regulate multiple employer welfare arrangements to assure the financial soundness and timely payment of benefits under such arrangements.'' *Id.* This concern was also expressed by the Committee on Education and Labor in the Activity Report of the Pension Task Force (94th Congress, 2d Session, 1977) cited by Congressman Erlenborn:

> It has come to our attention, through the good offices of the National Association of State Insurance Commissioners, that certain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans. For instance, persons whose primary interest is in the profiting from the provision of administrative services are establishing insurance companies and related enterprises. The entrepreneur will then argue that his enterprise is an ERISA benefit plan which is protected under ERISA's preemption provision from state regulation.

Id. As a result of the addition of section 514(b)(6), certain state laws regulating insurance apply to employee benefit plans that are MEWAs. However, the definition of a MEWA in section 3(40) provides that an employee benefit plan is not a MEWA if it is established or maintained pursuant to an agreement which the Secretary finds to be a collective bargaining agreement. Such a plan is therefore not subject to state insurance law regulation under section 514(b)(6). This exclusion is necessary to avoid disrupting the activities of legitimate Taft-Hartley plans.

[1] The Multiple Employer Welfare Arrangement Act of 1983 added section 514(b)(6) which provides a limited exception to ERISA's preemption of state insurance laws that allows states to exercise regulatory authority over employee welfare benefit plans that are MEWAs. Section 514(b) provides, in relevant part, that:

> (6)(A) Notwithstanding any other provision of this section—(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—
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> (I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and
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> (II) provisions to enforce such standards, and
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> (ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

Thus an employee welfare benefit plan that is a MEWA remains subject to state regulation to the extent provided in section 514(b)(6)(A). MEWAs which are not employee benefit plans are unconditionally subject to state law.

While the Multiple Employer Welfare Arrangement Act of 1983 significantly enhanced the states' ability to regulate MEWAs, problems in this area continue to exist as the result of the exception for collectively bargained plans contained in the 1983 amendments. This exception is now being exploited by some MEWA operators who, through the use of sham unions and collective bargaining agreements, market fraudulent insurance schemes under the guise of collectively bargained welfare plans exempt from state insurance regulation.[2] Another problem in this area involves the use of collectively bargained arrangements as vehicles for marketing health care coverage nationwide to employees and employers with no relationship to the bargaining process or the underlying agreement.

The Department believes that regulatory guidance in this area is necessary to ensure that (1) state insurance regulators have ascertainable guidelines to help identify and regulate MEWAs operating in their jurisdiction and (2) sponsors of employee health benefit programs will be able to determine independently whether their plans are established or maintained pursuant to collective bargaining agreements for purposes of section 3(40)(A) without imposing the additional burden of having to apply to the Secretary for an individual finding.[3]

The proposed regulation first establishes specific criteria that the Secretary finds must be present in order for an agreement to be a collection bargaining agreement for purposes of section 3(40) and, second, establishes certain criteria applicable to determining when an employee benefit plan or other arrangement is established or maintained under or pursuant to such an agreement for purposes of section 3(40). In this regard, the Department notes that section 3(40) not only requires the existence of a *bona fide* collective bargaining agreement, but also requires that the plan be ''established or maintained'' pursuant to such an agreement. The Department believes that, in establishing the exception under section 3(40)(A)(i) of the Act, Congress intended to accommodate only those plans established or maintained to provide benefits to bargaining unit employees on whose behalf the plans where collectively bargained. For this reason, the Department believes that the exception under section 3(40)(A)(i) should be limited to plans providing coverage primarily to those individuals covered under collective bargaining agreements. Accordingly, the criteria in the proposed regulation relating to whether a plan or other arrangement qualifies as ''established or maintained'' is intended to ensure that the statutory exception is only available to plans whose participant base is predominately comprised of the bargaining unit employees on whose behalf such benefits were negotiated.

The proposed regulation would, upon adoption, constitute the Secretary's finding for purposes of determining whether an agreement is a collective bargaining agreement pursuant to section (3(40) of the Act. The Department does not intend to make individual findings or determinations concerning an entity's compliance with the proposed regulation. The criteria contained in the proposed regulation are designed to enable entities and state insurance regulatory agencies to determine whether the requirements of the statute are met. Under the proposed regulation, entities seeking to comply with these criteria must, upon request, provide documentation of their compliance with the criteria to the state or state agency charged with investigating and enforcing state insurance laws.

B. Description of the Proposal

Proposed § 2510.3–40(a) follows the language of section 3(40)(A) of the Act and states that the term multiple employer welfare arrangement does not include an employee welfare benefit plan which is established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements. Proposed § 2510.3–40(b) provides criteria which the Secretary finds to be essential for an agreement to be collectively bargained for purposes of section 3(40)(A) of the Act. Proposed § 2510.3–40(c) sets forth requirements concerning individuals covered by the employee welfare benefit plan that must be satisfied in order for an employee welfare benefit plan to be considered established or maintained under or pursuant to a collective bargaining agreement as defined in § 2510.3–40(b). Proposed § 2510.3–40(d) provides definitions of the terms ''employee labor organization'' and ''supervisors and managers'' for purposes of this section. Proposed § 2510.3–40(e) explains that a plan does not satisfy the requirements of this section if the plan or any entity associated with the plan (such as the employee labor organization or the employer) fails or refuses to comply with the requests of a state or state agency with respect to any documents or other evidence in its possession or control that are necessary to make a determination concerning the extent to which the plan is subject to state insurance law. Proposed § 2510.3–40(f) provides that, in a proceeding brought by a state or state agency to enforce the insurance laws of the state, nothing in the proposed regulation shall be construed to prohibit allocation of the burden of proving the existence of all the criteria required by this section to the entity seeking to be treated as other than a MEWA.

Under the proposed regulation, a plan that fails to meet the applicable criteria would be a MEWA and thus subject to state insurance laws as provided in section 514(b)(6) of ERISA.

Each subsection of the proposed regulation is described in detail below.

1. General Rule and Scope

Proposed regulation 29 CFR 2510.3–40 establishes criteria which must be met for a plan to be established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements for purposes of section 3(40) of the Act. The proposed regulation is not intended to apply to or affect any other provision of federal law.[4]

In the Department's view, the exclusion of collectively bargained plans or other arrangements from the definition of a MEWA in section 3(40)(A) is an exception to the general statutory rule. Thus the entity asserting the applicability of the provisions concerning collectively bargained plans

[2] In addition, the Department has received requests to make individual determinations concerning the status of particular plans under section 3(40). *See, e.g., Ocean Breeze Festival Park* v. *Reich,* 853 F. Supp. 906, 910 (1994) (denying motion for mandamus and granting leave to amend complaint), *summary judgement granted sub nom. Virginia Beach Policemen's Benevolent Association, et al.,* v. *Reich,* 881 F. Supp. 1059 (E.D.Va. 1995); *Amalgamated Local Union No. 355* v. *Gallagher,* No. 91 CIV 0193(RR) (E.D.N.Y. April 15, 1991).

[3] It is the Department's position that the language of section 3(40) of ERISA does not require the Secretary to make individual findings that specific agreements are collective bargaining agreements. Moreover, a district court recently found that the Secretary has no ''statutory responsibility'' to make individualized findings. *Virginia Beach Policeman's Benevolent Association* v. *Reich,* 881 F. Supp. 1059, 1069–70 (E.D.Va. 1995).

[4] The Department notes that section 3(40) of ERISA is not the only provision that provides special rules to be applied to agreements that the Secretary finds to be collectively bargained. For example, sections 404(a)(1) (B) and (C) of the Internal Revenue Code (Code) provide special rules to determine the maximum amount of deductible contributions in the case of amendments to plans that the Secretary of Labor finds to be collectively bargained. In addition, Code sections 410(b)(3) and 413(a) exclude from minimum coverage requirements certain employees covered by an agreement that the Secretary finds to be a collective bargaining agreement.

in section 3(40) has the burden of providing evidence of compliance with the conditions of the statutory exception and the criteria set forth in the proposed regulation.[5] Accordingly, if an entity's status as established or maintained pursuant to one or more agreements which satisfy the criteria of the proposed regulation is challenged by a state or state agency, the entity seeking to be treated as other than a MEWA must produce sufficient evidence to establish that all of the requirements of the proposed regulation have been met.[6]

2. Definition of a Collective Bargaining Agreement

Proposed § 2510.3–40(b) establishes criteria that an agreement must meet in order to be a collective bargaining agreement for purposes of this section. An agreement constitutes a collective bargaining agreement only if the agreement is in writing and is executed by or on behalf of an employer of employees described in § 2510.3–40(c)(1) and by representatives of an employee labor organization meeting the requirements of § 2510.3–40(d)(1). In addition, the agreement must also be the result of good faith, arms-length bargaining binding signatory employers and the employee labor organization to the terms of the agreement for a specified project or period of time, and the agreement must be one which cannot be unilaterally amended or terminated. The Department notes that agreements in which an employer adopts all provisions of an existing agreement binding an employer and an employee labor organization to the terms and conditions of a collective bargaining agreement, such as a pattern agreement, will not fail to satisfy the requirements of proposed § 2510.3–40(b) if the original agreement as initially adopted satisfied the requirements of this section. The Department has also determined that collective bargaining agreements containing an agreement not to strike and providing that the collective bargaining agreement will terminate upon the initiation of a strike, often called ''no strike'' provisions, will not fail to satisfy the proposed regulation solely by reason of such provisions.

Proposed § 2510.3–40(b)(6) requires that a collective bargaining agreement may not provide for termination of the agreement solely as a result of the failure to make contributions to the plan. Proposed § 2510.3–40(b)(7) provides that an agreement will not constitute a collective bargaining agreement under this section if, in addition to the provision of health coverage, the agreement encompasses only the minimum requirements mandated by law with respect to the terms and conditions of employment (*e.g.*, minimum wage and workers' compensation). The phrase ''terms and conditions of employment'' as used in the proposed regulation is intended to have the same meaning and application as in case law decided under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (NLRA), and would include wages, hours of work and other matters of employment such as grievance procedures and seniority rights. For purposes of this section, the expiration of a collective bargaining agreement will not in and of itself prevent the agreement from satisfying the requirements under the proposed regulation if the agreement, although expired, continues in force.

3. Plans Established or Maintained

The proposed regulation also establishes certain criteria to determine when a plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40). Proposed § 2510.3–40(c) provides that in situations where a plan covers both individuals who are members of a group or bargaining unit represented by an employee labor organization as defined in proposed § 2510.3–40(d)(1) as well as other individuals, the plan will not be considered to be established or maintained pursuant to one or more collective bargaining agreements unless no less than 85% of the individuals covered by the plan are present or certain former employees and their beneficiaries, excluding supervisors and managers as defined in paragraph (d)(2), who are currently or who were previously covered by a collective bargaining agreement.[7] In addition, three groups of individuals may participate in the plan but are not counted in determining the total number of individuals covered by the plan for purposes of calculating the 85% limitation: (1) Present or former employees of the plan or of a related plan established or maintained pursuant to the same collective bargaining agreement; (2) present or former employees of the employee labor organization as defined in paragraph (d)(1) that is a signatory to the collective bargaining agreement pursuant to which the plan is maintained, and (3) beneficiaries of individuals in groups (1) and (2).

For purposes of the proposed regulation, the term ''former employee'' is limited to individuals who are receiving workers' compensation or disability benefits, continuation coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA) (Part 6 of title I of ERISA, 29 U.S.C. §§ 1161–1168), or who have retired or separated from employment after working for more than 1000 hours a year for at least three years for a signatory employer or employee organization, or the plan or related plan. For purposes of paragraph (c)(4), to be considered an employee of the plan, a related plan, or the signatory employee labor organization, an individual must work a least (A) 15 hours a week or 60 hours a month during the period of coverage under the plan, or (B) have worked at least 1000 hours in the last year and currently be on *bona fide* leave based on sickness or disability of the individual or the individual's family or on earned vacation time.

The proposed regulation requires that the plan satisfy the 85% limitation on the last day of each of the previous five calendar quarters unless the plan has not been in existence for five calendar quarters. If the plan or other arrangement has been in existence for a shorter period of time, it must satisfy the 85% limitation on the last day of each calendar quarter during which it has been in existence.

Through the requirement that no less than 85% of individuals covered by the plan be present or former bargaining

[5] 2A Sutherland Statutory Construction § 47.11 (Norman J. Singer ed. 5th ed. 1992); *United States* v. *First City National Bank of Houston*, 386 U.S. 361, 366 (1967) (burden of establishing applicability of statutory exception is on entity that asserts it); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948) (''First, the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits * * *.'')

[6] See *Donovan* v. *Cunningham*, 716 F. 2d 1455, 1467–68 n.27 (5th Cir. 1983) (citing *Securities and Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 126 (1953), ''As the Supreme Court has observed in a different context, it seems 'fair and reasonable' to place the burden of proof upon a party who seeks to bring his conduct within a statutory exception to a broad remedial scheme.'')

[7] Although the proposed regulation itself does not impose any specific restrictions concerning individuals who may be included in the 15%, the entity as a whole must comply with the requirements of section 3(1) of ERISA in order to be an employee welfare benefit plan covered by the Act. Section 3(1) provides that status as an ERISA covered plan is dependent on the composition and attributes of the participant base as well as the characteristics of the employer and employee organization. *See, e.g., Bell* v. *Employee Security Benefits Association*, 437 F. Supp. 382 (1977); Advisory Opinion 93–32 (letter to Mr. Kevin Long, December 16, 1993); Advisory Opinion 85–03A (letter to Mr. James Ray, January 15, 1985); Advisory Opinion 77–59 (letter to Mr. William Hager, August 26, 1977).

unit members, the proposed regulation intends to treat as MEWAs arrangements that permit individuals to participate in an employee welfare benefit plan solely as a result of membership or affiliation with an entity and not as a result of the individuals being legitimately represented in collective bargaining by a *bona fide* employee labor organization.[8] The Department believes that the 85% limitation in the proposed regulation is consistent with the purpose of the statutory exception in section 3(40)(A)(i) of ERISA for employee welfare benefit plans which are established or maintained as the result of collective bargaining on behalf of employees concerning the terms and conditions of their employment. To the extent that the Department's position as indicated in Advisory Opinion 9106A (January 15, 1991) to Gerald Grimes, Oklahoma Insurance Commissioner (concerning a trust that provided health care and other benefits to ''associate members'' of a labor organization who were not represented by the organization in collective bargaining), appears to express a different position, it would be superseded by the adoption of a final regulation that incorporates this requirement.

4. Definition of Employee Labor Organization

Proposed § 2510.3–40(d)(1) defines the term ''employee labor organization'' for purposes of this section. Proposed § 2510.3–40(d)(1)(i) provides that, with respect to a particular collective bargaining agreement, an employee labor organization must represent the employees of each signatory employer in one of two ways. All of a signatory employer's bargaining units covered by the collective bargaining agreement must either be certified by the National Labor Relations Board, or the employee labor organization must be lawfully recognized by the signatory employer as the exclusive representative for the employer's bargaining unit employees covered by the collective bargaining agreement. Such representation must take place without employer interference or domination. For purposes of the proposed regulation, employer interference or domination in the formation, administration, or operation of the employee labor organization includes taking an active part in organizing an employee organization or committee to represent employees; bringing pressure upon employees to join an employee organization; improperly favoring one of two or more employee organizations that are competing to represent employees; or otherwise unlawfully promoting or assisting in the formation or operation of the employee organization.

Under proposed § 2510.3–40(d)(1)(ii), an employee labor organization must operate for a substantial purpose other than that of offering or providing health coverage. Proposed § 2510.3–40(d)(1)(iii) states that an employee labor organization may not pay commissions, fees, or bonuses to individuals other than full-time employees of the employee labor organization in connection with the solicitation of employers or participants with regard to a collectively bargained plan. In addition, under subsection (d)(1)(iv), the term ''employee labor organization'' does not include an organization that utilizes the services of licensed insurance agents or brokers for soliciting employers or participants in connection with a collectively bargained plan. Proposed § 2510.3–40(d)(1)(v) requires an employee labor organization to be a ''labor organization'' as defined in section 3(i) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 402(i). Proposed § 2510.3–40(d)(1)(vi) also requires an employee labor organization to qualify as a tax-exempt labor organization under section 501(c)(5) of the Internal Revenue Code of 1986. It is the view of the Department that these criteria are necessary to distinguish organizations that provide benefits through legitimate employee representation from organizations that are primarily in the business of marketing commercial insurance products.

5. Supervisors and Managers

Proposed § 2510.3–40(d)(2) defines the terms ''supervisors and managers'' for purposes of this section. Proposed § 2510.3–40(d)(2) defines as ''supervisors and managers'' those employees of a signatory employer to a collective bargaining agreement who, acting on behalf of the employer, have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or who have responsibility to direct other employees or to adjust their grievances, or who have power to make effective recommendations concerning any of the actions described above. In order to be considered a supervisor or manager, an individual must be able to use independent judgment in the exercise of authority, responsibility, and power, and that exercise must be more than a routine or clerical function.

6. Failure To Provide Documents

The proposed regulation provides that even if a plan meets the requirements of subsections 2510.3–40 (b) and (c) of this section, it will not be considered to be established or maintained pursuant to an agreement that the Secretary finds to be a collective bargaining agreement if an entity, plan, employee labor organization or employer which is a party to the agreement fails or refuses to provide documents or evidence in its possession or control to a state or state agency which reasonably requests documents or evidence in order to determine the status of any entity either under the proposed regulation or under state insurance laws. While the proposed regulation enumerates criteria designed to enable entities to determine whether the requirements of the statute are met, the Department intends that, when requested to do so, entities will provide documentation of their compliance with the criteria to the state or state agency charged with investigating and enforcing state insurance laws. An entity seeking to be treated as other than a MEWA under the provisions of the proposed regulation has the burden of producing sufficient documents and other evidence to prove that it meets the criteria of the proposed regulation and is therefore entitled to application of the statutory exemption from the definition of a MEWA.

The Department anticipates that states or state agencies, including any commission, board or committee charged with investigating and enforcing state insurance laws, will utilize existing jurisdiction under state laws to require the production of documents and other evidence. Where the entity's compliance with the criteria of the proposed regulation is disputed by a state or state agency, the Department expects that the state or state agency will use its existing authority under state law to bring the matter before the appropriate state adjudicatory body to determine the facts. The proposed regulation does not restrict the authority of the state or state agency to reinvestigate the entity at any time if it believes the entity is not in compliance with the proposed regulation or with state laws.

7. Allocation of Burden of Proof

The proposed regulation provides that, in a proceeding brought by a state

[8] A number of instances have been brought to the Department's attention where entities have attempted to utilize purported collective bargaining agreements as a basis for marketing insurance coverage, generally under the guise of ''associate membership,'' to non-bargaining unit individuals and unrelated employers. *See, e.g., Empire Blue Cross and Blue Shield* v. *Consolidated Welfare,* 830 F. Supp. 170 (E.D.N.Y. 1993).

or a state agency to enforce the insurance laws of the state, nothing in the proposed regulation shall be read or construed to prohibit the allocation of the burden of proving the existence of all criteria required by this section to the entity seeking to be treated as other than a MEWA. The proposed regulation enumerates criteria designed to enable entities to determine whether the requirements of the statute are met. However, as discussed in paragraph 1. General Rule and Scope, supra, the Department believes that when challenged, the entity asserting the applicability of an exception has the burden of providing evidence of compliance with each of the terms of the proposed regulation.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires each Federal agency to perform a Regulatory Flexibility Analysis for all rules that are likely to have a significant economic impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions. The Pension and Welfare Benefits Administration has determined that, if adopted, this proposed rule may have a significant economic impact on a substantial number of small entities. Accordingly, as provided in section 603 of the Regulatory Flexibility Act (5 U.S.C. § 601, *et seq.*), the following initial regulatory flexibility analysis is provided:

(1) PWBA is considering the proposed regulation because it believes that regulatory guidance in this area is necessary to ensure (a) that state insurance regulators have ascertainable guidelines to help identify and regulate MEWAs operating in their jurisdictions, and (b) that sponsors of employee welfare benefit plans will be able to determine independently whether their plans are expected plans under section 3(40)(A) of ERISA. A more detailed discussion of the agency's reasoning for issuing the proposed regulation is found in the Background section, above.

(2) The objective of the proposed regulation is to provide guidance on the application of an exception to the definition of the term ''multiple employer welfare arrangement'' (MEWA) which is found in section 3(40) of ERISA and applies to certain employee welfare benefit plans. The legal basis for the proposed regulation is found at ERISA section 3(40) (23 U.S.C. 1002(40)); an extensive list of authority may be found in the Statutory Authority section, below.

(3) No accurate estimate of the number of small entities affected by the proposed regulation is available. No small governmental jurisdictions will be affected. It is estimated that a substantial number of small businesses and organizations will be affected, due to the fact that it is precisely those entities, seeking group health care coverage, that are most harmed by unscrupulous entrepreneurs who purport to provide employee health benefits. In a report entitled ''Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements,'' the United States General Accounting Office (GAO) calculated that between January 1988 and June 1991, fraudulent MEWAs left at least 398,000 participants and their beneficiaries with $123 million in unpaid medical claims and left many other participants without the health insurance they had paid for.[9] By restricting fraudulent and financially unsound MEWAs, the proposed regulation may limit the sources of health care coverage offered to small businesses. On the other hand, MEWAs that either meet the section 3(40) criteria or meet state regulatory standards are less likely to demonstrate the type of fraudulent or imprudent activity that prompted Congressional action. The GAO Report indicated that, during the January 1988 and June 1991 period, more than 600 MEWAs failed to comply with state insurance laws and some violated criminal statutes.[10] Consequently, small entities will receive a benefit from the reduced incidence of fraud and insolvency among the pool of MEWAs in the marketplace. To the extent that MEWAs themselves are small entities, they too will be affected by the proposed regulation.

(4) No identical reporting or recordkeeping is required under the proposed rule. However, this regulation clarifies the information that must be provided upon request to state authorities by those MEWAs wishing to take advantage of the exception under section 3(40)(A) of ERISA. The information to be provided will vary depending upon the entity involved but will include a written collective bargaining agreement and records on the individual covered by the plan for at least the last five calendar quarters. Such information is routinely prepared and held in the ordinary course of business under current law by most small entities. It is anticipated that the preparation of some of these documents would require the professional skills of an attorney, accountant, or other health benefit plan professional; however, the majority of the recordkeeping may be handled by clerical staff.

(5) No federal rules have been identified that duplicate overlap or conflict with the proposed rule.

(6) No significant alternatives which would minimize the impact on small entities have been identified. The proposed regulation is less costly in comparison with the alternative methods of determining compliance with section 3(40), such as case-by-case analysis by PWBA of each employee welfare benefit plan, or litigation. The costs of such alternatives would be unduly burdensome on small entities. No federal reporting is required. Instead, the proposed regulation would create standards by which the MEWAs may be reviewed by the states. It would be inappropriate to create an alternative with lower compliance criteria, or an exemption under the proposed regulation, for small MEWAs because those are the entities which pose a higher degree of risk of non-performance due to their increased likelihood of being under-funded or otherwise having inadequate reserves to meet the benefits claims submitted for payment.

Executive Order 12866 Statement

Under Executive Order 12866 (58 FR 51735, Oct. 4, 1993), the Department must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. Under section 3(f), the order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, the Department has determined that this program creates a improved method for statutory compliance that will reduce paperwork and regulatory compliance burdens on state

[9] GAO/HRD–92–40 (March 1992) at 2.

[10] *Id.*

governments, businesses, including small businesses and organizations, and make better use of scarce federal resources, in accord with the mandates of the Paperwork Reduction Act, the Regulatory Flexibility Act, and the President's priorities. The Department believes this notice is ''significant'' under category (4), *supra,* and subject to OMB review on that basis.

Paperwork Reduction Act

The proposed regulation does not contain any information collection or recordkeeping requirements as those terms are defined under the Paperwork Reduction Act because the information to be provided on request to state authorities will vary in each instance depending on the entity involved. Consequently, there is no requirement that the entities comply with identical reporting or recordkeeping requirements. 5 CFR 1320.7(c). Thus, the proposed regulation imposes no additional federal paperwork burden and the Paperwork Reduction Act does not apply.

Statutory Authority

This regulation is proposed pursuant to section 3(40) of ERISA (Pub. L. 97–473, 96 Stat. 2611, 2612, 29 U.S.C. 1002(40)) and section 505 (Pub. L. 93–406, 88 Stat. 892, 894, 29 U.S.C. 1135) of ERISA and under Secretary of Labor's Order No. 1–87, 52 FR 13139, April 21, 1987.

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pension and Welfare Benefit Administration.

Proposed Regulation

For the reasons set out in the preamble, the Department proposes to amend Part 2510 of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

PART 2510—[AMENDED]

1. The authority for Part 2510 is revised to read:

Authority: Secs. 3(2), 111(c), 505, Pub. L. 93–406, 88 Stat. 852, 894 (29 U.S.C. 1002(2), 1031, 1135); Secretary of Labor's Order No. 27–74, 1–86 (51 FR 3521, January 28, 1986), 1–87 (52 FR 13139, April 21, 1987), and Labor Management Services Administration Order No. 2–6.

Section 2510.3–40 is also issued under sec. 3(40), Pub. L. 97–473, 96 Stat. 2611, 2612 (29 U.S.C. 1002(40)).

Section 2510.3–101 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR 1978 Comp., p. 332, effective under E.O. 12108, 44 FR 1065, 3 CFR 1978 Comp. p. 275 and sec. 11018(d) of Pub. L. 99–272, 100 Stat. 82.

Section 2510.3–102 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR 1978 Comp., p. 332, effective under E.O. 12108, 44 FR 1065, 3 CFR comp., p. 275.

2. Part 2510 is amended by adding new § 2510.3–40 to read:

§ 2510.3–40 Plans established or maintained pursuant to one or more collective bargaining agreements.

(a) *General.* Section 3(40)(A) of the Employee Retirement Income Security Act of 1974 (the Act) provides that the term ''multiple employer welfare arrangement'' (MEWA) does not include an employee welfare benefit plan or other arrangement which is established or maintained under or pursuant to one or more agreements which the Secretary of Labor (the Secretary) finds to be a collective bargaining agreement(s). The purposes of the proposed regulation are to establish specific criteria that the Secretary finds must be met for an agreement to be a collective bargaining agreement and to establish criteria for determining when an employee benefit plan is established or maintained pursuant to such an agreement.

(b) *Collective Bargaining Agreement.* The Secretary finds, for purposes of section 3(40)(A) of the Act, that an agreement constitutes a collective bargaining agreement only if the agreement—

(1) is in writing;

(2) is executed by, or on behalf of, an employer of employees represented by an employee labor organization;

(3) is executed by an employee labor organization;

(4) is the product of good faith, arms-length bargaining between one or more employers and an employee labor organization or uniformly incorporates and binds one or more employers and an employee labor organization to the terms and conditions of another agreement which as originally negotiated and adopted satisfies the requirements of this section;

(5) binds signatory employers and the employee labor organization to the terms of the agreement for a specified project or period of time, cannot be unilaterally amended or terminated and contains procedures for amending the terms and conditions of the agreement;

(6) does not terminate solely as a result of failure to make contributions to the plan; and

(7) in addition to the provision of health coverage, provides more than the minimum requirements mandated by law with respect to the terms and conditions of employment (*e.g.,* provides for more than minimum wage and workers' compensation).

(c) *Established or Maintained.* An employee benefit plan is not established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40)(A) of the Act unless not less than 85 percent of the individuals covered by the plan are—

(1) employees, excluding supervisors and managers, currently included in one or more groups or bargaining units of employees covered by one or more collective bargaining agreements as defined in paragraph (b) of this section which expressly refer to the plan and provide for contributions thereto; or

(2) persons who were formerly employees described in paragraph (c)(1) of this section who are receiving workers' compensation or disability benefits, COBRA continuation coverage pursuant to Part 6 of title I of ERISA, 29 U.S.C. 1161–1168, or who have retired or separated from employment after working more than 1,000 hours a year for at least three years; or

(3) beneficiaries of individuals included in paragraphs (c) (1) and (2) of this section.

(4) For purposes of this subsection, the following individuals covered by the plan or other arrangement shall not be counted in determining the total number of individuals covered by the plan—

(i) employees of the plan or another plan established or maintained pursuant to the same collective bargaining agreement(s);

(ii) employees of an employee labor organization that meets the requirements of paragraph (d)(1) of this section and that is a signatory to the collective bargaining agreement(s) pursuant to which the plan is maintained;

(iii) persons who were formerly employees described in paragraphs (c)(4) (i) and (ii) of this section who are receiving workers' compensation or disability benefits, COBRA continuation coverage pursuant to part 6 of title I of ERISA, 29 U.S.C. 1161–1168, or who have retired or separated from employment after working more than 1,000 hours a year for at least three years; or

(iv) beneficiaries of individuals included in paragraphs (c)(4) (i), (ii) and (iii) of this section;

(v) provided that, for purposes of paragraphs (c)(4) (i) and (ii) of this section, in order to be an employee, an individual must work at least:

(A) 15 hours a week or 60 hours a month during the period of coverage under the plan, or

(B) Have worked more than 1000 hours in the last year and currently be on *bona fide* leave based on sickness or disability of the individual or the individual's family or on earned vacation time.

(5) For purposes of calculating whether the 85% limitation has been met, a plan or other arrangement must satisfy the requirements of paragraphs (c) (1) through (4) of this section on the last day of—

(i) each of the previous five calendar quarters; or

(ii) if the plan has been in existence for fewer than five calendar quarters, every calendar quarter during which the plan has been in existence.

Definitions

(1) *Employee Labor Organization.* For purposes of this section, an ''employee labor organization'' shall mean an organization that—

(i) represents, with respect to a particular collective bargaining agreement, the employees of each signatory employer to the agreement where:

(A) All of the employer's bargaining units covered by the agreement are certified by the National Labor Relations Board, or

(B) The employee labor organization is lawfully recognized by the signatory employer (*e.g.*, without employer interference or domination) as the exclusive bargaining representative for the employer's bargaining unit employees covered by the agreement;

(ii) provides substantial representational services to employees regarding the terms and conditions of their employment in addition to health coverage;

(iii) does not pay commissions, fees, or bonuses to individuals, other than full-time employees of the employee labor organization, in connection with the solicitation of employers or participants;

(iv) does not utilize the services of licensed insurance agents or brokers for soliciting employers or participants;

(v) is a ''labor organization'' as defined in section 3(i) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. section 402(i); and

(vi) qualifies as a tax-exempt labor organization under section 501(c)(5) of the Internal Revenue Code of 1986.

(2) Supervisors and Managers. For purposes of this section, ''supervisors and managers'' shall mean any employees of a signatory employer to an agreement described in paragraph (b) of this section who, acting in the interest of the employer, have—

(i) Authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees; or

(ii) Responsibility to direct other employees or to adjust their grievances; or

(iii) Power to make effective recommendations concerning the actions described in paragraphs (d)(2) (i) and (ii) of this section;

as long as the exercise of the authority, responsibility and power in paragraphs (d)(2) (i), (ii) or (iii) of this section is not of a merely routine or clerical nature, but requires the use of independent judgment.

(e) *Failure to provide documents or other necessary evidence.* This section shall not apply to any plan or other arrangement if, in conjunction with an investigation or proceeding by a state or state agency, the plan, arrangement, any employee labor organization or employer which is a party to the agreement(s) at issue fails or refuses to provide the state or state agency with any document or other evidence in its possession or control that is reasonably requested by the state or state agency for the purpose of determining the status of the plan or other arrangement under state insurance laws or under this section.

(f) *Allocation of burden of proof.* In a proceeding brought to enforce state insurance laws, nothing in the proposed regulation shall be construed to prohibit a state or state agency from allocating the burden of proving the existence of all the criteria required by this section to the entity seeking to be treated as other than a MEWA.

Signed at Washington, DC, this 26th day of July 1995.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration.

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